No. 16-1027

# In the Supreme Court of the United States

RYAN AUSTIN COLLINS,

*Petitioner,*

v.

COMMONWEALTH OF VIRGINIA,

*Respondent.*

**On Writ of Certiorari to the Supreme Court of Virginia**

## BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER


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## INTEREST OF THE *AMICUS CURIAE*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. To those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.[1]

The Framers of our Constitution recognized that the Fourth Amendment's protection against abuse of government authority is a critical bulwark of Americans' liberty. That protection remains just as essential today. Cato files this brief to explain why the decision below improperly diminishes the Fourth Amendment's core protection of the privacy of Americans' homes.

## SUMMARY OF ARGUMENT

"A man's home is his castle" is not just an aphorism—it is also a longstanding legal principle. From Biblical times through to the English common law, the home was recognized as a place of refuge in which the owner is protected against uninvited private parties and unjustified government intrusion.

That legal protection against arbitrary government incursions into the home was embodied in the

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties have provided written consent to the submission of this *amicus* brief.

Fourth Amendment, which resulted in large measure from Americans' reaction to the British authorities' use of general warrants and writs of assistance to search colonists' homes without any individualized suspicion. As a result of this history, "when it comes to the Fourth Amendment, the home is first among equals." *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013).

At common law, and under the Fourth Amendment, the protection accorded to the home extends to its surrounding grounds and out-buildings—the curtilage. "'[I]ntimately linked to the home, both physically and psychologically," the curtilage is regarded "as part of the home itself for Fourth Amendment purposes." *Ibid.*

The Fourth Amendment's protection of the home and its curtilage is one example—albeit the clearest example—of the Amendment's protection against unreasonable government intrusion into Americans' private property. The text of the Amendment refers to "[t]he right of the people to be secure in their * * * houses, papers, and effects," and the Court's application of its protections encompasses "government trespass upon the areas ('persons, houses, papers, and effects') [the Amendment] enumerates." *United States* v. *Jones*, 565 U.S. 400, 405 (2012).

Permitting warrantless searches of vehicles parked on the home's curtilage is squarely inconsistent with the Fourth Amendment's special solicitude for the privacy of the home. And it would permit officers to intrude further by employing the plain view doctrine with respect to other parts of the curtilage or home visible as a result of an intrusion to search the parked vehicle.

The principal justification for allowing warrantless searches of vehicles is the reduced expectation of privacy in vehicles as they travel on public roads. But there is no such reduced expectation when a vehicle is parked at home. To the contrary, expectations of privacy are at their zenith in the home and its surroundings.

To the extent the automobile exception rests on vehicles' mobility—and the Court has moved away from that rationale—a vehicle parked at home is immobile. And if it leaves the home and curtilage it would become subject to search.

Moreover, "the availability of the exigent circumstances exception" assures that the warrant requirement does not undermine critical law enforcement needs. *Riley* v. *California*, 134 S. Ct. 2473, 2494 (2014). For example, the need to prevent physical harm or destruction of evidence and the "hot pursuit" doctrine will allow officers to intrude on the curtilage without a warrant. In the absence of those circumstances, however, the Fourth Amendment's warrant requirement applies to protect Americans' most private refuge against the abusive use of government power.

## ARGUMENT

### The Officers Were Required To Obtain A Warrant To Search Petitioner's Vehicle.

#### A. The Fourth Amendment provides especially strong protection for individuals' homes and surrounding curtilage.

The home has long been afforded special protection against unjustified intrusion by government authorities. The Fourth Amendment, reflecting that

history and the colonists' outrage at British searches without warrants supported by individualized probable cause, incorporates special solicitude for the home. And, as was true at common law, that protection extends to a home's surrounding curtilage.

*1. Special protection for the privacy of the home has a lengthy historical pedigree.*

Long before America won its independence, an individual's special privacy right in his home was well-established.

The Book of Deuteronomy instructs that a lender should not go into his neighbor's house to secure repayment: "When thou dost lend thy brother any thing, thou shalt not go into his house to fetch his pledge. Thou shalt stand abroad, and the man to whom thou dost lend shall bring out the pledge abroad unto thee." *Deuteronomy* 24:10-11. Similarly, Joshua declined to send his messengers to search Achan's tent for stolen goods until he had secured a confession from Achan himself. *Joshua*, 7:16-24.

The Romans also believed the house was "not only an asylum but was under the special protection of the household gods." 1 Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 15 (1937).

Anglo-Saxon and Norman law sought to specially protect the home by harshly punishing its breach. In Anglo-Saxon law, "*domus invasio*," home invasion, was a crime punishable by execution. *Id.* at 19.

English common law incorporated the same precept, recognizing that "a man's house is his castle." Edward Coke, *The Institutes of the Laws of England*

162 (London, Fletcher, Lee, & Pakeman 1644); see also *Semayne's Case* (1604), 77 Eng. Rep. 194, 195 ("the house of everyone is to him as his castle and fortress").

That axiom was given life by the courts, which punished violations of the home more harshly than violations of other property. Burglary at common law was limited to the breaking and entering of a dwelling house or other building located on its curtilage. 2 Wayne R. LaFave, *Substantive Criminal Law* § 21.1 (2d ed. 2003). And acts committed with the intent of inflicting a harm generally were punished as a misdemeanor, but "breaking into a *house* at night with the intent to commit a felony was itself a felony." Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 642 n.259 (1999) (emphasis added).

Protection against unjustified government intrusions into the home was also an element of English common law. William Pitt enunciated the principle in his famous address to the House of Commons in 1763:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter!

William Pitt, Earl of Chatham 1708-78, *Oxford Dictionary of Quotations* (7th ed. 2009). It was adopted by English courts in the celebrated *Wilkes* and

*Entick* cases,[2] described by one legal historian as "the most famous colonial-era cases in all America—the O.J. Simpson and Rodney King cases of their day." Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 Suffolk U. L. Rev. 53, 65 (1996).

*Wilkes* involved a broad warrant issued by the Secretary of State without probable cause under oath. That warrant authorized searches of the homes and private papers of numerous individuals potentially responsible for publication of *The North Briton No. 45*, which criticized the King. Government agents "ransacked houses and printing shops in their searches, arrested forty-nine persons (including the pamphlet's author, Parliament member John Wilkes), and seized incriminating papers—all under a single general warrant." M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave It Birth*, 85 N.Y.U. L. Rev. 905, 910 (2010).

Several of the individuals targeted brought tort actions against those executing the warrant seeking damages in trespass for the searches, seizure of papers, and arrests. *E.g.*, *Wilkes* v. *Wood* (1763), 98 Eng. Rep. at 489, 489. The courts held that the general warrant did not provide a defense against liability, because such warrants were "illegal, and contrary to the fundamental principles of the constitution." *Id.* at 499; accord *Money* v. *Leach* (1765), 97 Eng.

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[2] *Wilkes* v. *Wood* (1763), 98 Eng. Rep. 489; *Entick* v. *Carrington* (1765), 95 Eng. Rep. 807.

Rep. 1075, 1088; *Huckle* v. *Money* (1763), 95 Eng. Rep. 768, 769.[3]

*2. The Fourth Amendment was adopted to safeguard the privacy of Americans' homes.*

James Otis's speech in Boston against writs of assistance—which authorized general searches by the British of colonists' homes[4]—famously invoked the house-as-castle metaphor. 2 *Legal Papers of John Adams* 142 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). That speech was, according to John Adams, "'the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'" *Riley* v. *California*, 134 S. Ct. 2473, 2494 (2014) (citation omitted).

It therefore is not at all surprising that "[t]he sanctity of the home lay at the heart" of the precursors to the Fourth Amendment included in the state constitutions of Massachusetts, New Hampshire, Pennsylvania, and Vermont. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1277 (2016).

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[3] Another general warrant targeted the publisher of an allegedly seditious pamphlet. In the suit by the publisher seeking damages in trespass for harm resulting from the search, the court rejected the defendants' reliance on the general warrant: "we can safely say there is no law in this country to justify the defendants in what they have done; if there was it would destroy all of the comforts of society." *Entick*, 95 Eng. Rep. at 817.

[4] These court-issued writs "empowered a customs officer to search any place on nothing more than his own (subjective) suspicion." M. Blane Michael, 85 N.Y.U.L. Rev. at 907-908.

In the debates over ratification of the new Federal Constitution, Antifederalists criticized the absence of such a protection, "sarcastically predict[ing] that the general, suspicionless warrant would be among the Constitution's 'blessings.'" *Maryland* v. *King*, 133 S. Ct. 1958, 1981 (2013) (Scalia, J., dissenting). "Patrick Henry warned that the new Federal Constitution would expose the citizenry to searches and seizures 'in the most arbitrary manner, without any evidence or reason.'" *Ibid.*

One pamphleteer, calling himself "Cato Uticensis," warned Virginia readers that if they approved the Constitution: "'you subject yourselves to see the doors of your houses them [*sic*] impenetrable Castles of freemen, fly open before the magic wand of an excisman.'" William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791*, 677-678 (2009) (quoting Cato Uticensis, Virginia Independent Chronicle, Oct. 17, 1787, at 1). "The magnitude of [the] publicity" regarding inclusion of an express prohibition on general warrants "indicated the emergence of a consensus for a comprehensive right against unreasonable search and seizure." *Id.* at 686.

By 1789, James Madison had concluded that the new Constitution should be amended to include protection of "essential rights," including providing "security against general warrants." Letter from James Madison to George Eve (Jan. 2, 1789); see also *King*, 133 S. Ct. at 1981 (Scalia, J., dissenting) (explaining that "Madison's draft of what became the Fourth Amendment answered" the Antifederalists' concerns about the lack of any constitutional protection against general warrants). That protection, subsequently embodied in the Fourth Amendment, was deemed "indispensable to the full enjoyment of the

rights of personal security, personal liberty, and private property." 3 Joseph Story, *Commentaries on the Constitution of the United States: With a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution* § 1895 (1833).

Given this history, it is not at all surprising that "when it comes to the Fourth Amendment, the home is first among equals." *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013). As the Court has repeatedly held, "'[a]t the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman* v. *United States*, 365 U.S. 505, 511 (1961)); see also *United States* v. *U.S. Dist. Court*, 407 U.S. 297, 313 (1972) ("physical entry of the home is the chief evil against which the Fourth Amendment is directed").

*3. The Fourth Amendment's special solicitude for the home extends to its curtilage.*

From the common law to today, the protection accorded to an individual's home has extended beyond the house itself to the surrounding property, known as the "curtilage." Indeed, this Court has recognized that the practice of treating the curtilage as part of the home is "'as old as the common law.'" *Jardines*, 569 U.S. at 6 (quoting *Hester* v. *United States*, 265 U.S. 57, 59 (1924)).

For example, the common law categorized as burglary the entry by intruders onto any "parcel of the mansionhouse," because "the capital house protects and privileges all its branches and appurtenants, if within the curtilage or homestall." 4 Wil-

liam Blackstone, *Commentaries on the Laws of England* *225 (1769). It was a "'sacred'" principle that "'no man can set his foot on his neighbour's close without his leave.'" *Jardines*, 569 U.S. at 8 (quoting *Entick*, 95 Eng. Rep. at 817). The curtilage is "intimately linked to the home, both physically and psychologically." *Jardines*, 569 U.S. at 6.

Because the curtilage is viewed as part and parcel of the home, courts "regard the area 'immediately surrounding and associated with the home' * * * as 'part of the home itself for Fourth Amendment purposes.'" *Ibid.* (quoting *Oliver* v. *United States*, 466 U.S. 170, 180 (1984)).

*4. Protection of the home is an example of the Fourth Amendment's broad protection of private property against unjustified government intrusion.*

The Fourth Amendment's protection of the home and curtilage is the most robust example of the Amendment's general protection of private property against incursions by the government.

The Court has explained, "[t]he text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to 'the right of the people to be secure against unreasonable searches and seizures'; the phrase 'in their persons, houses, papers, and effects' would have been superfluous." *United States* v. *Jones*, 565 U.S. 400, 405 (2012). For that reason, "[the Court's] Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century." *Ibid.*

It continues to be true that Fourth Amendment protection is triggered by "government trespass upon the areas ('persons, houses, papers, and effects') [the Amendment] enumerates." *Id.* at 406. "[T]he law of property 'naturally enough influence[s]' our 'shared social expectations' of what places should be free from governmental incursions." *Jardines*, 569 U.S. at 13-14 (Kagan, J., concurring) (quoting *Georgia* v. *Randolph*, 547 U.S. 103, 111 (2006).

"[P]roperty rights are not the sole measure of Fourth Amendment violations," but the Court's adoption of the "reasonable expectation of privacy" standard did not "snuf[f] out the previously recognized protection for property." *Soldal* v. *Cook County*, 506 U.S. 56, 64 (1992); see also *Minnesota* v. *Carter*, 525 U.S. 83, 88 (1998) (defining the "reasonable expectation of privacy" triggering Fourth Amendment protection as an expectation "that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society" (internal quotation marks omitted)); *United States* v. *Knotts*, 460 U.S. 276, 286 (1983) (reaffirming the principle "that, when the Government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment") (Brennan, J., concurring in judgment) (emphasis omitted).

Indeed, the *Jones* Court rested its decision on this ground, holding that the Fourth Amendment's protections applied because "[t]he Government physically occupied private property"—the car to which it

attached a beeper—"for the purpose of obtaining information." 565 U.S. at 404.

The Amendment's protection of the home is thus one example—albeit the most important example—of its general protection of private property against unjustified government intrusions.

### B. Warrantless searches of vehicles parked on curtilage would seriously erode the Fourth Amendment's protection of the home.

The Court has explained that "an officer's leave to gather information is sharply circumscribed when he steps off[] thoroughfares and enters the Fourth Amendment's protected areas." *Jardines*, 569 U.S. at 7. Warrantless searches of vehicles parked in a driveway or on another part of a home's curtilage—indisputably the Fourth Amendment's most protected areas—would violate this principle.

*First*, allowing such warrantless searches would permit government officials to intrude into a home and its surroundings any time they have probable cause to suspect that a vehicle parked on the curtilage contains contraband or other evidence of crime. That result is fundamentally incompatible with the Fourth Amendment's "particular concern for government trespass," *Jones*, 565 U.S. at 406, that infringes on basic property and privacy rights. Far from guarding against the "physical entry of the home"—the central concern of the Fourth Amendment—such an approach would open the door to that "chief evil." *United States District Court*, 407 U.S. at 313.

This Court has repeatedly recognized that when otherwise permissible government intrusions occur

on the home or curtilage, heightened property and privacy interests require the government to obtain a warrant.

Thus, the Court held that a dog sniff on the curtilage constitutes a search under the Fourth Amendment, see *Jardines*, 569 U.S. at 11-12, despite reaching the opposite conclusion for dog sniffs of luggage at the airport, *United States* v. *Place*, 462 U.S. 696 (1983), or vehicles lawfully stopped on the highway, *Illinois* v. *Caballes*, 543 U.S. 405 (2005).

The Court similarly held that use of a beeper to monitor the movement of a container of chemicals in an individual's residence was a Fourth Amendment search, *United States* v. *Karo*, 468 U.S. 705 (1984), even though such monitoring does not constitute a search when confined to public places, as in *United States* v. *Knotts*, *supra*.

In *California* v. *Greenwood*, 486 U.S. 35 (1988), this Court was careful to restrict its holding to the claim that there is no reasonable expectation of privacy in "garbage left for collection *outside the curtilage of a home*." *Id.* at 37 (emphasis added).

Although the Court has not squarely addressed the question in the vehicle context, it has come close to endorsing the same conclusion. Thus, a plurality refused to uphold the warrantless search of a vehicle parked at a home in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). And the Court in *California* v. *Carney* stated that justifications underlying the automobile exception apply "[w]hen a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place *not regularly used for residential purposes*." 471 U.S. 386, 392-93 (1985) (emphasis added).

As with other intrusions into the home and its surroundings, permitting warrantless searches of vehicles parked at home is fundamentally incompatible with the Fourth Amendment's special solicitude for the privacy of the home.

*Second*, the diminution of property and privacy rights would not be limited to the search of the vehicle. The plain view doctrine permits officers to seize an item that is in plain view provided that (1) they observe it from a lawful vantage point; (2) they have a right of physical access to it; and (3) it is immediately apparent to him that it is contraband or a fruit, instrumentality, or evidence of a crime. *Horton* v. *California*, 496 U.S. 128, 136-137 (1990).

Allowing officers to enter the curtilage without a warrant radically extends officers' lawful vantage point over the curtilage and expands their right of access to it, thus greatly enabling their ability to seize items of personal property under the plain view doctrine. The right to be secure in one's home would have "little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity." *Jardines*, 569 U.S. at 6.

*Third*, there is no logical justification for distinguishing vehicles from other containers or structures on the curtilage. The Court has explained that "curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *United States* v. *Dunn*, 480 U.S. 294, 301 (1987).

A vehicle parked on the curtilage satisfies each of these criteria. It is virtually always proximate to the home—in a driveway or garage. The vehicle itself is an enclosure, often used to store personal items. And the vehicle's contents generally are not visible to passers-by.

Indeed, that is the conclusion reached by the plurality in *Coolidge*: "If we were to accept [the] view that warrantless entry for purposes of arrest and warrantless seizure and search of automobiles are *per se* reasonable, so long as the police have probable cause, it would be difficult to see the basis for distinguishing searches of houses and seizures of effects. * * * If the police may, without a warrant, seize and search an unoccupied vehicle parked on the owner's private property, not being used for any illegal purpose, then it is hard to see why they need a warrant to seize and search a suitcase, a trunk, a shopping bag, or any other portable container in a house, garage, or back yard." 403 U.S. at 479-80 (plurality opinion).

### C. The justifications underlying the Automobile exception do not apply when a vehicle is parked on the curtilage.

The automobile exception rests on two justifications: a reduced expectation of privacy stemming from pervasive regulation and the inherent mobility of automobiles. *Carney*, 471 U.S. at 392-393. Neither rationale applies to vehicles parked at home.

1. An individual may have a reduced expectation of privacy in a vehicle when it is on the road—because of the many regulatory requirements that apply and can be enforced by police officers. See *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976)

("[a]s an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order").

But, for the reasons already discussed, there is no such reduced expectation when a vehicle is parked at home. To the contrary, expectations of privacy are at their zenith at the home and its surroundings.

2. Nor does the inherent mobility justification apply to vehicles parked at the home.

That justification initially rested on a rationale tied to exigent circumstances. Thus, in *Carroll* v. *United States*, 267 U.S. 132 (1925)—the case in which the Court first recognized the automobile exception—the vehicle was in transit on the highway when the police spotted it. Its occupants could not have been arrested prior to the search, making it impossible for the police to stop them from driving the vehicle out of the jurisdiction. *Id.* at 169. The Court explained that it is not practicable to secure a warrant when "the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Id.* at 153.

Since *Carroll*, however, the Court has appeared to sever the mobility justification from any requirement of exigency. *Maryland* v. *Dyson*, 527 U.S. 465, 466 (1999) ("the 'automobile exception' has no separate exigency requirement"); *Chambers* v. *Maroney*, 399 U.S. 42 (1970) (holding that a car's inherent mobility justified the police in seizing it, moving it to the police station, and searching it there without a

warrant, even though its occupants were in custody at the time).

Indeed, the Court has recognized that even though the original justification for the exception "was the [automobile's] vagrant and mobile nature," subsequent warrantless searches were upheld in cases in which mobility was "remote, if not nonexistent." *Cady* v. *Dombrovski*, 413 U.S. 433, 441-442 (1973).

If the automobile exception no longer rests on a vehicle's mobility, and instead is justified entirely by reference to the reduced expectation of privacy, that justification does not apply to vehicles parked at the home—for the reasons already discussed.

If the automobile exception remains in some way related to mobility, that justification has little force with respect to a vehicle parked at home. Law enforcement officers can keep watch to ensure that the vehicle does not leave the home until they obtain a warrant. If it does exit the curtilage, the automobile exception would allow it to be searched.

Finally, to the extent the exception rests on the possibility of exigent circumstances, there is no basis for an exception to the warrant requirement decoupled from actual exigent circumstances. And where such circumstances are present, the existing exigent circumstances rule will allow the police to act.

The Court has steadfastly stood by the principle that—at least when it comes to the home and its surrounding curtilage—an exception to the warrant requirement demands a genuine exigency. "[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation'

make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey* v. *Arizona*, 437 U.S. 385, 393-394 (1978) (quoting *McDonald* v. *United States*, 335 U.S. 451, 456 (1948)).

The *Mincey* Court declined to create a general "murder scene exception" to the warrant requirement, rejecting the idea that "the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search." *Id.* at 394. Similarly, this Court has declined to create a blanket exception for warrantless searches of the home for narcotics based on the fact that they are "easily removed, hidden, or destroyed," insisting that warrantless searches for narcotics must still be justified on a case-by-case basis by genuinely exigent circumstances. *Vale* v. *Louisiana*, 399 U.S. 30, 34 (1970).

Here, as in other contexts, "the availability of the exigent circumstances exception" assures that the warrant requirement does not undermine critical law enforcement needs. *Riley* v. *California*, 134 S. Ct. 2473, 2494 (2014).

At common law, there were a few limited circumstances in which no warrant was required for the search of the home or its curtilage, all of which involved restraining a dangerous person. One such example was for constables or other officers in hot pursuit of a criminal known to have committed an offense so serious as to breach the King's peace. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1222-1223 (2016).

Relatedly, officers, witnesses, or people responding to "hue and cry" could break down doors of any

home in which the felon breaching the King's peace hid, and seize any items there. Constables could also enter a home without a warrant to break up a fight or keep the peace. *Id.* at 1230 (citing 2 Matthew Hale, *Historia Pacitorum Caronae* 95 (1736)).

Modern doctrine recognizes several of the same situations as exigent circumstances. For example, hot pursuit is still an exigent circumstance that may justify warrantless intrusion into the home. *United States* v. *Santana*, 427 U.S. 38, 42 (1976). Officers may also enter a home without a warrant to aid an individual who may be hurt in a brawl inside. *Brigham City* v. *Stewart*, 547 U.S. 398, 406-07 (2006).

This Court has also come to consider the imminent removal or destruction of evidence as another exigent circumstance justifying a warrantless search. In *Ker* v. *California*, the Court affirmed a warrantless search based on officers' fears that evidence in the form of narcotics was about to be destroyed. 374 U.S. 24, 42 (1963) (plurality opinion). This Court has however repeatedly reasserted that the removal or destruction of evidence must be "imminent" to justify bypassing the warrant requirement. *Missouri* v. *McNeely*, 569 U.S. 141, 168 (2013) (Roberts, C.J., concurring in part and dissenting in part). The Court has framed its imminence requirement in no uncertain terms: "[w]here there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation." *Roaden* v. *Kentucky*, 413 U.S. 496, 505 (1973). In other words, the *mere possibility* that evidence may be removed or destroyed is insufficient to displace the warrant requirement.

These existing exigency exceptions encompass all instances in which the mobility of a vehicle parked on the curtilage presents a genuinely pressing enforcement challenge. Like any other structure located on the curtilage, a vehicle may be searched without a warrant if the vehicle's mobility creates one of the established exigencies the Court has recognized.[5]

Concerns about urgent law enforcement imperatives therefore provide no basis for a rule broadly permitting warrantless searches of vehicles parked at home.

## CONCLUSION

The judgment of the Supreme Court of Virginia should be reversed.

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[5] Pursuit was the basis for the Court's decision in *Scher* v. *United States*, 305 U.S. 251 (1938). The police were in pursuit of the car that was searched—and in addition the search was justified as incident to arrest. *Id.* at 253, 255; see also *Coolidge*, 403 U.S. at 459 n.17 (plurality opinion).

Respectfully submitted.

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